

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of: Dave MCDYSAN <i>et al.</i>	Confirmation No.: 7587
Application No.: 09/723,480	Examiner: Bates, Kevin T.
Filed: November 28,2000	Group Art Unit: 2456
Attorney Docket No.: RIC00044	

For: MESSAGE, CONTROL AND REPORTING INTERFACE FOR A
DISTRIBUTED NETWORK ACCESS SYSTEM

Commissioner for Patents
Alexandria, VA 22313-1450

REQUEST FOR REHEARING
Appeal No. 2009-003742

Dear Sir:

Appellants respectfully request rehearing in view of the following clear errors in the Board Decision of September 17, 2009.

**1. THE BOARD ERRS IN PLACING THE INITIAL BURDEN OF
DEMONSTRATING PATENTABILITY ON APPELLANTS**

At page 6 of the Decision of September 17, 2009, the Board indicates that Appellants' argument by highlighting portions of the claims as being in contrast to that taught by *Albert et al.* is a "mere general allegation of patentability" and does not specify "how the highlighted language...patentably distinguishes the claimed invention over Albert." The Decision then goes on to say that "[t]his form of argument is wholly ineffective in demonstrating error in the Examiner's prima facie case...We find such general allegation of patentability does not meet Appellants' burden."

Appellants respectfully point out that highlighting the distinguishing features of the claims is not a “mere general allegation of patentability” because Appellants set forth, in great detail, at pages 10-12 of the principal Brief, and pages 3-4 of the Reply Brief, exactly why these highlighted portions of the claim distinguish over *Albert et al.*, viz, because *Albert et al.* does not disclose the forwarding agents and service managers as being in a network separate from a network comprising servers 220. Accordingly, the distinguishing features of the claims were not only highlighted for the Board’s convenience, but the arguments included in the Briefs specifically explained just **how and why** these highlighted portions of the claims distinguish over the *Albert et al.* reference. Therefore, the Board erred in asserting that Appellants’ highlighting of the distinguishing claimed features is “mere general allegation of patentability” and does not specify “how the highlighted language...patentably distinguishes the claimed invention over Albert.”

Further, the Board erred in asserting that “[t]his form of argument is wholly ineffective in demonstrating error in the Examiner’s *prima facie* case...We find such general allegation of patentability does not meet **Appellants’ burden.**” Appellants’ argument that *Albert et al.* failed to disclose the claimed “wherein the second network is different from the first network” is an argument asserting the lack of establishment of a *prima facie* case of anticipation by *Albert et al.* because the reference lacks a specific showing of certain claimed features. As the Board is well aware, the initial burden of establishing a *prima facie* case of anticipation is on the Examiner and the USPTO. It is not Appellants’ burden, in the first instance, to proffer evidence of patentability. It is only after the Examiner establishes a *prima facie* case of anticipation that the burden shifts to Appellants to present arguments and/or evidence to rebut such *prima facie* case. Therefore, the Board erred in contending that “[w]e find such general allegation of patentability does not meet Appellants’ burden.”

For this reason, alone, the Honorable Board is respectfully requested to reconsider the decision of September 17, 2009 and to reverse the Examiner's rejection of claims 1-4, 7-9, 12, 13, 17, 20-24, 27, 28, 31, 32, 36, 39, and 40 on appeal under 35 U.S.C. §102(c).

2. THE BOARD MISCONSTRUES THE CLAIMS ON APPEAL IN FINDING THAT THE FORWARDING AGENTS AND SERVERS OF *ALBERT ET AL.* ARE IN TWO DIFFERENT NETWORKS BECAUSE, EVEN BY THE BOARD'S OWN INTERPRETATION, GROUP OF SERVERS 220 OF *ALBERT ET AL.* DOES NOT CONSTITUTE A "NETWORK."

The Decision interprets "network" as "a series of nodes interconnected by communication paths" (Decision, page 9). This is not a reasonable interpretation of the term "network" as employed in the instant disclosure. But, even under the Board's overly broad definition, the group of servers 220 in *Albert et al.* does not constitute a "network" because servers 221-223 within the box labeled 220 (group of servers), even if considered a "series of nodes," are not "interconnected by communication paths," as required by the Decision to constitute a "network." Since it is very clear that the group of servers 220 does not constitute a "network," by any definition, including the definition ascribed by the Board, it cannot be a "second network" that "is different from the first network," as claimed. Significantly, the only elements that servers 221-223 are interconnected with are forwarding agents 1 and 2 (elements 231 and 232). Neither Fig. 1 nor Fig. 2A, of *Albert et al.*, each showing a plurality of servers, depicts these servers as being interconnected. Thus, if each of the servers and each of the forwarding agents constitute a "node," or all of these elements constitute a "series of nodes" that are "interconnected by communication paths," in accordance with the Board's own definition, the elements 221, 222, 223, 231, 232, 241, and 242 of *Albert et al.* may constitute a "network," but, clearly, the group of servers 220, alone, does not constitute a "second

network” that “is different from the first network,” (because group of servers 220 is not a “network,” at all).

Since nothing in the disclosure of *Albert et al.* would have led the skilled artisan to conclude that the plurality of servers 221-223 are interconnected to each other, the Board’s interpretation that these servers are interconnected, is in error.

Respectfully, the Board has clearly erred in interpreting the group of servers 220 in *Albert et al.* as a “network,” let alone a “second network” that “is different from the first network.” By the Board’s own definition, the group of servers 220 does not constitute a “network.”

For this reason, again, the Honorable Board is respectfully requested to reconsider the decision of September 17, 2009 and to reverse the Examiner’s rejection of claims 1-4, 7-9, 12, 13, 17, 20-24, 27, 28, 31, 32, 36, 39, and 40 on appeal under 35 U.S.C. §102(e).

3. THE BOARD ERRED IN FINDING THAT THE SERVERS IN ALBERT ET AL. ARE INTERCONNECTED WITH EACH OTHER, FORMING A NETWORK

At page 10 of the Decision, the Board takes Appellants’ statement that the servers 220 in *Albert et al.* “could, conceivably, be located within a network separate from a network comprising the forwarding agents 231, 232, and service managers, 1 and 2” (page 3 of the Reply Brief), and, **without basis**, concludes that “Appellants appear to be arguing that Albert does not disclose that the ‘second network’ is ‘always’ and ‘exclusively’ located within a network separate from the ‘first network’.” The Board, after setting up this “straw man” argument knocks it down by asserting that this argument is not commensurate in scope with the claim language since such “always” and “exclusively” language is not recited in Appellants’ claims.

Respectfully, Appellants never argued anything about a second network being “always” and “exclusively” located within a network separate from the first network. Those are the Board’s words, not Appellants’. The Board has set up its own straw man argument regarding “always” and “exclusively” and then shoots it down by asserting that its own argument is not commensurate in scope with the claim language. In fact, Appellants’ argument at page 3 of the Reply Brief was merely to note that Appellants were not denying that it is conceivable that there **could** be a network of servers separate from the forwarding agents and service manager, but that the mere possibility that something **could** be does not make for an anticipation, within the meaning of 35 U.S.C. § 102(e). Appellants, at no time, ever indicated, and do not so indicate now, that the disclosure of *Albert et al.* ever provided, at any time, for the group of servers 220 to constitute a network, separate from a network comprising the service managers and the forwarding agents. Merely because one **could** place the servers in a separate network does not mean that such is either disclosed by *Albert et al.* (it is not) or that it would have been obvious to do so (it would not have been but, in any event, the rejection is based on anticipation, not obviousness). The fact is that *Albert et al.* is applied as an anticipatory reference under 35 U.S.C. § 102(e) and, in fact, fails to disclose an important claim feature, viz., “wherein the second network is different from the first network.” Appellants never argued that the second network is always and exclusively located within a network separate from the first network. Appellants, in fact, only argued the language of the instant claimed invention. A portion of the claimed subject matter recites “wherein the second network is different from the first network.” Thus, in order to anticipate the claimed subject matter, the Examiner must show that somewhere in *Albert et al.*, there is a second network that is different from the first network, as claimed. The Examiner has not done so, and cannot do so. Ergo, the rejection must fail and the Honorable Board is respectfully requested to reconsider and to

reverse the Examiner's rejection of claims 1-4, 7-9, 12, 13, 17, 20-24, 27, 28, 31, 32, 36, 39, and 40 on appeal under 35 U.S.C. §102(e).

The Board has erred in its assertion, in the paragraph bridging pages 10-11 of the Decision, that "Albert discloses...a second network comprising servers interconnected by communication paths." Absolutely nowhere in *Albert et al.* is there a disclosure of the servers in the group of servers 220 being interconnected by a communication path. They may be interconnected with the forwarding agents by a communication path, but they are not interconnected with each other. Therefore, to the extent that the servers constitute nodes, these nodes are not interconnected within the group of servers 220 and, therefore, do not constitute a "network."

For this reason, again, the Honorable Board is respectfully requested to reconsider the decision of September 17, 2009 and to reverse the Examiner's rejection of claims 1-4, 7-9, 12, 13, 17, 20-24, 27, 28, 31, 32, 36, 39, and 40 on appeal under 35 U.S.C. §102(e).

Since *Albert et al.* lacks the claim features discussed above and the secondary references do not provide for these deficiencies, the rejections under 35 U.S.C. §103 must also fail and the Honorable Board is respectfully requested to reconsider and to reverse the rejections under 35 U.S.C. §103.

Accordingly, because of the above-identified clear errors by the Board in interpreting the applied references, Appellants hereby respectfully request that the Board rehear and reconsider its decision and reverse the Examiner's rejection of claims 1-40 under 35 U.S.C. §§102(c) and 103.

Respectfully Submitted,

DITTHAVONG MORI & STEINER, P.C.

October 26, 2009
Date

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